

**Australian Competition  
&  
Consumer Commission**

**PRE-DECISION CONFERENCE**

**Minutes**

**Applications for authorisation A91367 - A91375  
lodged by the Australasian Performing Right Association Ltd**

**8 November 2013**

The information and submissions contained in this minute are not intended to be a verbatim record of the pre-determination conference but a record of the discussions sufficient to set out the matters raised by the persons participating in the conference. A copy of this document will be placed on the ACCC's public register.

**Pre-Decision Conference:  
Applications for authorisation A91367 - A91375  
lodged by the Australasian Performing Right Association Ltd**

8 November 2013

Australian Competition and Consumer Commission (ACCC), Melbourne.  
Videoconference facilities to the ACCC's Brisbane, Canberra and Sydney offices and  
teleconference facilities.

**Attendees:**

*Australian Competition and Consumer Commission*

Jill Walker, Commissioner (in Melbourne)  
Richard Chadwick, General Manager, Adjudication Branch (in Melbourne)  
Darrell Channing, Director, Adjudication Branch (in Canberra)  
Tess Macrae, Senior Project Officer, Adjudication Branch (in Melbourne)  
David Ball, Principal Lawyer (in Sydney)  
Annamie Hale, Senior Lawyer (in Melbourne)  
Lin Johnson, Principal Economist (by teleconference)

*Australasian Performing Right Association Ltd*

Brett Cottle, CEO (in Melbourne)  
Jonathan Carter, General Counsel (in Melbourne)  
Richard Mallett, Head of Revenue (in Melbourne)  
Kate Haddock, Partner, Banki Haddock Fiora (in Melbourne)  
Jennifer Gome, Director Licensing (in Melbourne)  
Amy Broomfield (in Melbourne)  
Andrew Harris (in Melbourne)  
Kirsty Rivers (in Melbourne)

*Australian Hotels Association National Office*

Des Crowe, CEO (in Melbourne)  
Hank Spier, Spier Consulting Pty Ltd (in Canberra)

*ALH Group Pty Ltd*

David Curry, General Manager, Government and Corporate Relations (in Melbourne)

*Live Performance Australia*

Evelyn Richardson, CEO (in Melbourne)  
Holly Crain, Policy Advisor (in Melbourne)

*Association of Liquor Licensees Melbourne*

Con Sarrou, Treasurer (in Melbourne)  
Hank Oudendyk (in Melbourne)

*Wrokdown*

Anita Monk, Producer (in Melbourne)

*Nightlife Music*

Stuart Watters, Licensing & Business Affairs (in Melbourne)  
Jay Mogis (in Melbourne)

*One Louder Entertainment*  
Bill Cullen (in Melbourne)

*Totem Onelove*  
Marcus Walkom, Solicitor, Media Arts Lawyers (in Melbourne)

*National Film and Sound Archive of Australia*  
Adam Flynn, Principal Legal Counsel, Legal Services Section (in Canberra)

*Association of Australian Musicians*  
John Prior (in Sydney)  
Geoff Marr (in Sydney)

*Queensland Hotels Association*  
Justin O'Connor, Chief Executive (in Brisbane)

*Eatons Hill Hotel*  
Robert Comiskey, Owner (in Brisbane)

*Australian Hotels Association (Victoria)*  
Brian Kearney, Chief Executive Officer (in Brisbane)

*NSW Small Business Commissioner*  
Adam Spivakovsky, Acting Senior Policy Advisor, Advocacy (by teleconference)  
Julie Giuffre (by teleconference)

Dr Jon Sainken (by teleconference)

Conference commenced: 11.10am AEST

Submissions received from interested parties are available at [www.accc.gov.au/authorisations](http://www.accc.gov.au/authorisations).

**Commissioner Walker** welcomed attendees, made some introductory remarks outlining the purpose of the conference and procedures to be followed at the conference, declared the pre-decision conference open, and invited the Australian Hotels Association National Office (AHA), the party who called the conference, to make an opening statement.

**Des Crowe** (CEO, AHA) noted the AHA's main issues of concern:

- transparency of licence categories and fees. Mr Crowe submitted that it is appropriate for the plain English guides to be prepared prior to final authorisation in consultation with interested parties and the ACCC. Mr Crowe noted that interim authorisation removes the time pressure on the Australasian Performing Right Association (APRA), which means that there would be time for APRA to prepare the plain English guides before final authorisation. Mr Crowe suggested the guide include the licence categories relevant to AHA members, such as background music at venues, music played from TV screens, pre-recorded music and live music, and that APRA should also produce a plain English application form that clarifies common queries and is easy to navigate;
- the Guidelines for the Copyright Tribunal to be published by the ACCC;
- alternative dispute resolution (ADR). The AHA noted that it would not comment on this further at this time.

Commissioner Walker noted that a draft of the Guidelines would be released soon, and confirmed for Mr Crowe that the ACCC would adjourn this conference and reconvene the conference at a later date.

**Brett Cottle** (CEO, APRA) noted that APRA has provided a submission in response to the draft determination. Mr Cottle submitted that APRA is willing to consult on the plain English guides, however it is not possible to receive sign-off from all licensees, noting the diversity of licensees. Mr Cottle submitted that it should be up to the ACCC to make a decision on the adequacy of the guides, not any group of licensees.

**Jonathan Carter** (General Counsel, APRA) submitted that APRA would be able to design both plain English guides and implement the revised ADR by 30 June 2014 (i.e. conditions of authorisation C3, C4, C5). Mr Carter considered that the purpose of interim authorisation is to enable consultation with interested parties about the conditions of authorisation and to provide certainty for APRA. Mr Carter indicated that APRA is happy to take the time to consult on the conditions if it helps to flesh them out, however it would not be workable to discuss details about wording, style etc.

Mr Carter suggested that the ACCC should be able to grant final authorisation before 30 June 2014. This would enable the conditions to be finalised so as to provide enough certainty to direct APRA's design of the guides and ADR but would not include implementation and assessment of the effectiveness of the conditions. Mr Carter noted that the effectiveness of the plain English guides will be subject to scrutiny by the ACCC.

## Licensee matters

**Evelyn Richardson** (CEO, Live Performance Australia (LPA)) noted that LPA's members mostly use the live music licence category. Ms Richardson noted that LPA is happy with the ADR consultation. Ms Richardson raised concerns about the plain English guides – in particular she suggested that APRA should be required to consult with major stakeholders. LPA wishes to avoid a situation where licensees have to wait for three years before they can seek changes to the guides. LPA accepts that final approval will come from the ACCC. Ms Richardson also asked about the ACCC's timing for the release of its Guidelines for the Copyright Tribunal. Commissioner Walker noted that the ACCC is looking to consult on a draft of the Guidelines, which is likely to occur before 30 June 2014.

**Con Sarrou** (Treasurer, Association of Liquor Licensees Melbourne (ALLM)) noted that most of the ALLM's members are nightclubs. Mr Sarrou submitted that there have been large tariff increases in the past few years as a result of APRA price discriminating between users, resulting in disputes with APRA. Mr Sarrou submitted that APRA's fees represent about 78c per patron for ALLM members. Mr Sarrou asked the ACCC to consider the option of parallel importing in order to buy a cheaper copyright licence from an overseas organisation as this would introduce international competition and provide some parity with overseas providers.

**Stuart Watters** (Licensing and Business Affairs, Nightlife Music) commended the ACCC on the thoroughness of its process. Mr Watters submitted that the transparency of licence fees has been a concern for a number of licensees. Mr Watters submitted that condition C3 will provide relief and reduce the burden of disputes for both parties. Mr Watters considered that the requirement to be 'plain English' is open to interpretation and the process should be moderated by an external party, such as the ACCC, and should be subject to a review process. Mr Watters suggested that the development of the plain English guides should also use Ms Kirschner to ensure there is a clear understanding of how tariffs are applied. Mr Watters considered that there are grounds for clearer information on the licence forms, and that a plain English annual renewal form should be developed. Mr Watters suggested that individuals other than music industry experts or copyright experts, particularly in the public performance area, should be considered to hear ADR matters.

**Justin O'Connor** (Chief Executive, Queensland Hotels Association (QHA)), on behalf of the QHA and Robert Comiskey (Comiskey Group), submitted that most of APRA's licensees are small unsophisticated businesses with little knowledge of music licensing. Mr O'Connor submitted that many licensees are confused by the two copyright societies and this is compounded by their interactions with APRA about the licence types, fees and application process. The QHA sees the reauthorisation process as an opportunity to put in place clearer and simpler processes and a fairer ADR scheme.

The issues the QHA would like addressed include:

- a one size fits all licence application form;
- the variety of different licence types;
- full disclosure of what is a sound source (e.g. the application of screen tariffs); and
- commissions paid to APRA staff.

**Brian Kearney** (CEO, Australian Hotels Association (Victoria)) supported the submissions of the AHA and related associations and LPA.

**Adam Flynn** (Principal Legal Counsel, Legal Services Section, the National Film and Sound Archive) noted that there is a review of copyright that is due to be released in February 2014. Mr Flynn submitted that the National Film and Sound Archive would be interested in making a submission to the ACCC about APRA at a later date.

**John Sainken** submitted that the main issue is the under-resourcing of the Copyright Tribunal and that the ACCC should seek changes through Government to empower the Tribunal. Dr Sainken submitted that the Tribunal has confused its role and lacks confidence in its powers (for example, in its consideration of licence fees for nightclubs (2007) and fitness centres (2010)).

Dr Sainken is supportive of the proposed conditions of authorisation but submitted that the real problem is that there is no real oversight of collecting societies' rates, which are too high. Dr Sainken asked whether the ACCC has any avenue to comment upon the appropriateness of the Copyright Tribunal, or an alternative body, as the body supervising copyright fee structures, or to make fundamental changes to the Tribunal. Commissioner Walker noted that if the Commission wanted to it could comment in the final determination but this would not be binding on any party and that the ACCC already has a role in some Copyright Tribunal matters.

Dr Sainken noted that the ACCC's role is to protect consumers and sought confirmation that this is the ACCC's objective in the APRA matter. Commissioner Walker explained that the ACCC is applying the authorisation provisions of the Competition and Consumer Act and how those provisions work.

**Adam Spivakovsky** (Acting Senior Policy Advisor, Advocacy, Office of the Small Business Commissioner) agreed with the AHA's comments. Mr Spivakovsky offered that disputes could be referred to any Small Business Commissioner. Mr Spivakovsky noted that APRA is a monopoly and therefore it is important that the mitigating mechanisms are properly enforced, for example having a mandatory code of conduct to ensure increased clarity, and that there is a mechanism for stakeholders to have some influence on the guides. Mr Spivakovsky submitted that it would be preferable to resolve any issues before final authorisation given that authorisation will be granted for a number of years.

In response, Mr Cottle noted that:

- APRA is ending any and all commissions paid to its employees from 30 June 2014;
- APRA agrees that there are a range of suitable experts for the ADR process and understands that Ms Kirschner will be asking interested parties to suggest suitable people;
- while the Copyright Tribunal may be under-resourced (although not under-developed), this is a common problem for commonwealth tribunals. Mr Cottle also made some clarifying remarks regarding the Fitness Tribunal matter, primarily that it was a PPCA case, not an APRA case. (In reply, Dr Sainken noted that APRA had subsequently reflected the outcome of that matter in setting its own licence fees for fitness businesses).
- Regarding the proposal for parallel importation, he suggested that the real issue is about the reasonableness of the licence fees. Mr Cottle submitted that there are a number of legal and logistical issues with parallel importing and that it would be unworkable for some classes of licensees. Also there are some instances were

APRA's fees are higher but there are also instances where APRA fees are lower in this regard.

Mr Crowe noted that most groups do not have a collective bargaining authorisation in place to enable collective negotiation in relation to price. Mr Crowe asked that the ACCC summarise the options for parties including industry bodies to seek a collective bargaining authorisation in its final determination. Commissioner Walker noted Mr Crowe's point and commented that it would be up to individual parties to decide whether authorisation should be sought. **Richard Chadwick** noted that authorisation may not be required in order for an industry body to consult with its members. Mr Cottle agreed with Commissioner Walker's comment and noted that APRA supports changes that will make consultation easier.

#### Member matters

**Bill Cullen** (One Louder Entertainment; Association of Artist Managers (AAM) Board Member) noted that the AAM supports music managers and does not share some of the other concerns raised by interested parties. Mr Cullen supports the new ADR system.

**John Prior** (Association of Australian Musicians) noted that the Association of Australian Musicians represents Australian musicians, most of whom are independent. Mr Prior noted that the Association of Australian Musicians' members have full support from APRA in their negotiations with licensees. Mr Prior submitted that the price of music is affordable and there has been a lot of upheaval in the industry. Mr Prior submitted that everyone understands the importance of music in the industry. Mr Prior indicated that he is looking forward to discussing the issues raised with APRA and commenting further when the conference is reconvened.

#### Other matters

After a query from an interested party, Mr Carter submitted that the guide under condition C4 will be available on APRA's website and information about opt out and licence back will also be readily available on APRA's website.

**Anita Monk** (Wrokdawn) noted that APRA deals with incoming and outgoing incomes and APRA should ensure Australian musicians get the larger portion of the funds.

Ms Richardson confirmed with Commissioner Walker that an interim authorisation remains in place.

Mr Crowe asked what the process is from here in terms of the conditions and final authorisation. Commissioner Walker noted that nothing will be determined until after this process has concluded. The ACCC will seek submissions on issues other than ADR by 6 December 2013. Commissioner Walker noted that early next year there will be discussion about the final form of ADR, followed by further consultation, then the conference will be reconvened and after it is terminated the ACCC will proceed to release a final determination. The Commission must decide what form the conditions will take (after the conclusion of the conference).

Commissioner Walker noted Ms Kirschner has raised four initial issues regarding ADR (attendees will also be advised of this by email):

- Should APRA engage a 'Dispute Resolution Facilitator' (rather than an administrator) to manage the process? If so, should the administrator appoint the third party if the parties cannot agree?

- Should there be a non-binding tier 2 involving an external advisor/facilitator (separate to the 'Dispute Resolution Facilitator'), in addition to the two binding options in the draft determination?
- Who should pay the costs of an ADR matter in order to maintain appropriate incentives for the advisors to remain independent of APRA and to encourage the parties to resolve the dispute?
- Should the condition specify binding timeframes and/or processes for each of the tiers and then leave the decision maker to otherwise manage the process as they see fit?

Commissioner Walker adjourned the conference with some final statements. Commissioner Walker noted that the conference will be reconvened in early 2014 to discuss ADR matters. Commissioner Walker noted that staff will prepare a summary of the day's proceedings.

Conference closed: 1230pm AEST